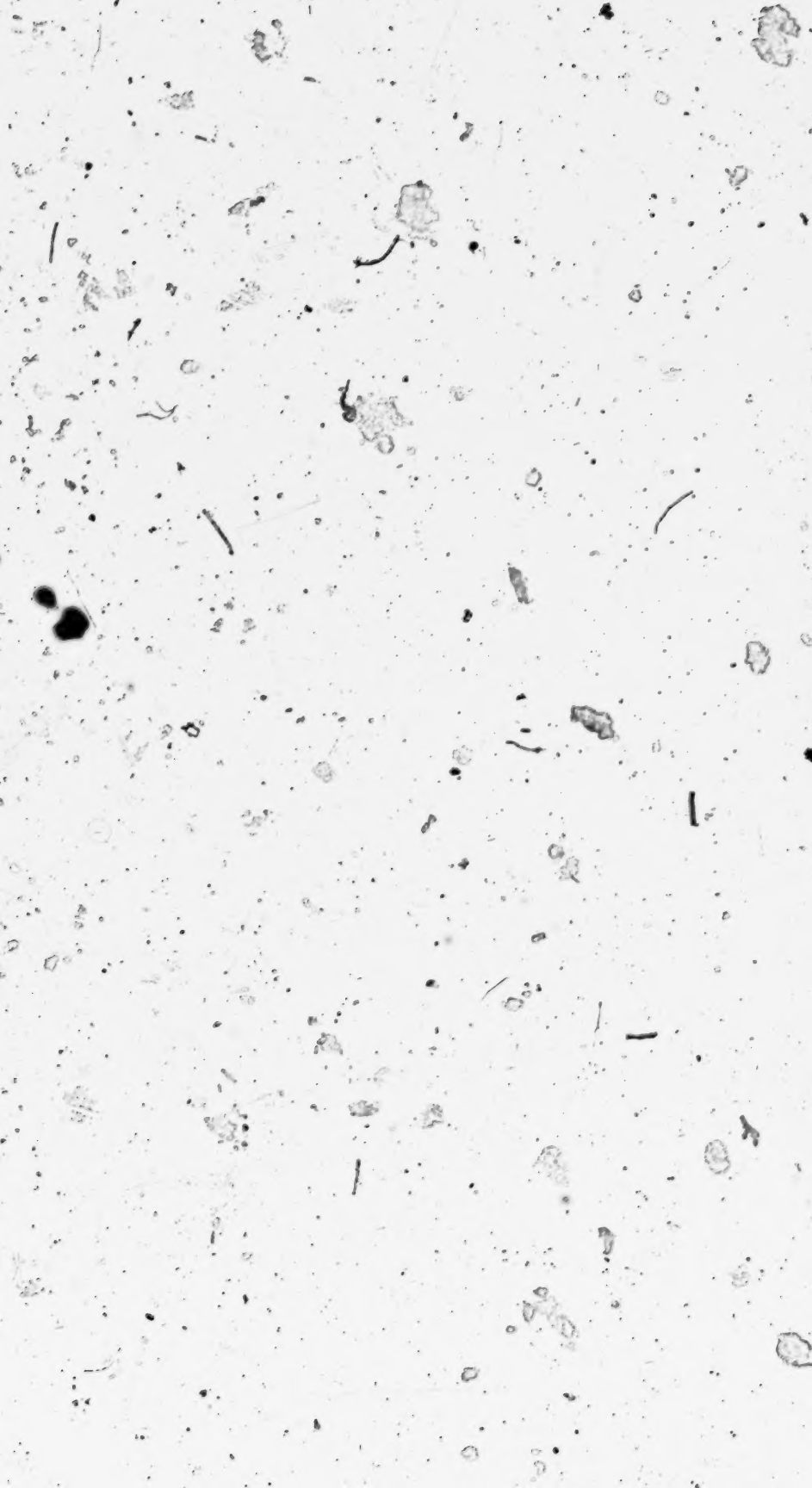


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No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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SECTION 6 OF THE RAKER ACT IS A CONSTITUTIONAL EXERCISE OF THE LAW-MAKING POWER OF CONGRESS AND AS A LAW ITS ENFORCEABILITY IS IN NO WAY AFFECTED BY THE EQUITABLE DEFENSES ASSERTED BY THE RESPONDENT

In addition to the argument on the two points raised in the Government's main brief, the respondent raises a further question. It is asserted that Section 6, regarded as a statute, is unconstitutional, is not an exercise of the law-making power, and, therefore, must be considered only as a covenant in a contract to which the city assented (Br. 177, 181). Upon this premise it is urged that certain equitable defenses make the covenant unen-

forceable.[1] The premise is obviously fallacious and with it falls the argument founded upon it.

1. *Section 6 of the Raker Act is constitutional.*—Congress has the absolute and unlimited power to prescribe the conditions and the mode by which interests in the public lands shall be transferred.[2]

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[1] For the assistance of the Court the arrangement of the briefs may be described: Respondent's first and second points (Br. 54–56, 56–58) are so frivolous as to make discussion unnecessary. Respondent apparently addresses its points 4–9, 14 and 15 (Br. 58–109, 165–176) to the Government's first argument in the main brief. Respondent's points 10–13 (Br. 109–165) are addressed to the Government's second argument. Respondent's point 16 (Br. 177–187) and, indirectly, point 17 (Br. 188–197) are treated in this reply brief.

Respondent bases no argument upon its repeated assertion as to tardiness of the United States in making its contention that the statute prohibits an agency agreement as well as one to sell energy for resale (Br. 12–22, 96–97) but concedes that the question is here presented for decision (Br. 30). Indeed, it could not do otherwise since this contention was advanced by reply brief in the district court filed February 26, 1938, long prior to the argument on March 22, 1938, and was treated below as within the issues (R. 420, 666, 674; Br. 20, 23). *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 97; *Wasatch Mining Co.* v. *Crescent Mining Co.*, 148 U. S. 293, 299–300; *Martin* v. *Ambrie*, 262 Fed. 44, 46–47.

[2] The constitutionality of Section 6 may here be rested not only on the power of Congress to impose conditions on the disposition of public lands but also on its power to regulate them, since the United States retains rights of reverter in the lands granted by the Raker Act. As the Secretary of the Interior has specifically held, the Raker Act granted to the City only a determinable fee. 53 L. D. 425. *Rio Grande Western Railway Company* v. *Stringham*, 239 U. S. 44, 47; *Kern River Co.* v. *United States*, 257 U. S. 147, 152–154.

U. S. Const., Art. IV, sec. 3, cl. 2; *Gibson* v. *Chouteau*, 13 Wall. 92, 99. Thus it may restrict alienation of public lands after their conveyance to homesteaders. *Ruddy* v. *Rossi*, 248 U. S. 104. And in granting lands it may impose restrictions and regulations as to the manner of their subsequent disposal. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 421–422. The power in Congress includes a power as to its property analogous to the police power. Thus, for protection of public lands it may regulate the use made by individuals of private lands. *Camfield* v. *United States*, 167 U. S. 518, 525–526; *United States* v. *Alford*, 274 U. S. 264, 267; cf. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404–405; *McKelvey* v. *United States*, 260 U. S. 353. Indeed, the United States in granting rights in its lands to States may even impose conditions unrelated to the rights granted. *Arizona* v. *California*, 283 U. S. 423, 450, 464. Congress, of course, has power to adopt all means reasonably necessary to effectuate any of the purposes for which the Federal Government was created and this includes authority to regulate contracts of private individuals or of a state. *Frisbie* v. *United States*, 157 U. S. 160, 165; *Calhoun* v. *Massie*, 253 U. S. 170, 175; *New York* v. *United States*, 257 U. S. 591, 601; *Highland* v. *Russell Car Co.*, 279 U. S. 253, 261. It follows that in the exercise of its authority over public lands Congress may regulate contracts so far as they contemplate the use of such lands. See *Stephenson* v.

Binford, 287 U. S. 251, 274–275. So here, Congress in granting rights-of-way over its lands and the right to use other portions of such lands for reservoir and power-development purposes was fully authorized as a condition to the grant of such rights under the Raker Act, to prohibit by Section 6 the contract here in question.

2. *Respondent is estopped to deny the constitutionality of Section 6.*—Since the City has accepted and is presently utilizing and enjoying the substantial rights, privileges and benefits conferred by the Raker Act, under well-established principles it is now estopped from contesting the constitutionality of a provision in the Act which qualifies and limits the rights granted to the City. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 469; *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208, 211; *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573 (C. C. A. 8), certiorari denied, 291 U. S. 672.

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[3] The respondent argues (Br. 38, 195–196) that the water and water rights involved in the Hetch Hetchy project were acquired under the laws of California and not from the United States. The references in the record to water appropriations by the City (R. 445–447) plainly relate only to filings, and mere filings do not perfect title. *Inyo Consolidated Water Co.* v. *Jess*, 161 Cal. 516 (1911); 46 I. D. 89, 95–96.

Whether the right to appropriate waters on the public lands of the United States deraigns from the United States

3. *Section 6 is to be given effect as a statute.*— The language quoted by the respondent from *United States* v. *Midwest Oil Co.*, 236 U. S. 459, and *Butte City Water Co.* v. *Baker*, 196 U. S. 119 (Br. 177), plainly fails to negative the well-settled rule that every act of Congress making a grant of the public lands is properly to be given effect both as a law and as a conveyance. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 415, 427, 435; *Wisconsin Central R'd Co.* v. *Forsythe*, 159 U. S. 46, 55; *United States* v. *Denver &c. Railway*, 150 U. S. 1, 14; *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 625; *Missouri, etc. Ry. Co.* v. *Kansas Ry. Co.*, 97 U. S. 491. This rule is not limited to any particular type of grant, but applies whether the grant be to a railroad, *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 422; to a settler who has made a homestead entry, *Hall* v. *Russell*, 101 U. S. 503, 509; or to a state, *United States* v. *Southern Oregon Co.*, 225 Fed. 560, 568 (Ore.).

Neither is there any merit in the attempted distinction of the *Oregon & Cal. R. R.* case, *supra*,

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as owner of such waters, *California Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 162; *Lux* v. *Haggin*, 69 Cal. 255, 336 (1886); or from the state, no rights in the water on the lands of the Park or Forest could be acquired either by purchase or appropriation until the City had received permission to build and had completed the works essential to the diversion and application of the water to beneficial use. *Silver Lake etc. Co.* v. *Los Angeles*, 176 Cal. 96, 103–104 (1917). The City could not, therefore, have perfected any water rights prior to the passage of the Raker Act and the construction of necessary diversion works.

on the ground that the statute there involved was held to be such only because passed "for a national purpose" (Br. 178). The national purposes were there considered, not in determining the character of the statute as law, but in ascertaining whether its provisions should be enforced by forfeiture.

4. *Since Section 6 is a valid Federal statute, its requirements cannot be defeated by defenses urged by respondent as effective against the enforcement of mere contract rights.*—The objection that enforcement of the Raker Act will tend to restrain trade (Br. 183) has no merit. Obviously, the general policy against restraint of trade cannot defeat the specific and paramount policy for the prevention of monopoly expressed by Congress in Section 6. This is the ultimate expression of public policy applicable to this case. *Borgnis* v. *Falk Co.*, 147 Wis. 327 (1911); *Vidal* v. *Girard's Executors*, 2 How. 126, 197; see *United States* v. *Belmont*, 301 U. S. 324, 331, 332. It is also plain that state law against unreasonable restraints on alienation invoked by respondent (Br. 183) is ineffective to limit restrictions imposed in grants by the United States. Cf. *Bunch* v. *Cole*, 263 U. S. 250, 253–254; *Sunderland* v. *United States*, 266 U. S. 226, 233. Furthermore, the rule in question is directed against restraints on the alienation of a fee simple. See 3 Thompson, Real Property (1924) sec. 2007, p. 95. This restraint, as to sale of energy, is but a restriction as to the use of the granted lands. Such restrictions as to use, even though general, are

valid. *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680 (1919).

Respondent argues (Br. 186) that the injunction should not be granted because to grant it would be to deprive the city of an annual revenue of $2,200,000. This argument is strange to the law. It is but to say that violation of the law (or breach of the contract) is to be excused because respondent may suffer a monetary loss from its enforcement. Furthermore, the City does not show that it could not secure an equal or even greater revenue from some other mode of disposition of the energy.

In answer to the respondent's inference (Br. 197) that it is necessary for the United States to have a "balance of equities" in its favor in order to procure the relief asked, it is to be noted that the protection of the public interest by the enforcement of a statute is sufficient to outweigh any outstanding "equities". *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 427.

Respondent contends that noncompliance with the prohibition of Section 6 is excused by legal impossibility, in that its voters will not provide for the raising of funds with which to purchase distribution facilities. The defense of impossibility is not available in a suit brought to enforce a statute. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393. Furthermore, the so-called impossibility is purely subjective. That is, the City, through its voters, has said "we will not do it" rather than "it cannot be done." This type of

impossibility cannot excuse performance. See Williston, Contracts (Rev. ed. 1938) sec. 1932, p. 5411. Finally, there obviously can be no impossibility of compliance where, as here, the obligation imposed is a negative one, a mere prohibition.

CONCLUSION

Since the respondent persists in violating section 6 of the Raker Act, its enforcement through court action by the Attorney General at the request of the Secretary of the Interior becomes a duty under the express provisions of section 9 (u) of the Act. Injunction is obviously the appropriate means for such enforcement and is therefore authorized by the Act. The so-called secondary defenses are all without merit, and the judgment of the circuit court of appeals should be reversed.

Respectfully submitted.

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